IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

WRIT PETITION NO.2386 OF 1988

1. Shrirang Ramratan Chandak,
Indian Inhabitant residing at
Dhanraj Galli, Amravati
Dist: Amravati, Maharashtra.

2. Master Rangnath Shrirang
Chandak (Minor) residing at
Dhanraj Lane, Amravati,
Dist: Amravati through his
Natural Guardian Petitioner No.1.

3. Master Sarangpani Shrirang
Chandak (Minor) residing at
Dhanraj Lane, Amravati,
Dist: Amravati through his
Natural Guardian Petitioner No.1.

4. Miss.Sharda Shrirang
Chandak (Minor) residing at
Dhanraj Lane, Amravati,
Dist: Amravati through his
Natural Guardian Petitioner No.1.

5. Master Bajrang Shrirang
Chandak (Minor) residing at
Dhanraj Lane, Amravati,
Dist: Amravati through his
Natural Guardian Petitioner No.1. Petitioners

vs.

1. Union of India, Ministry of
Finance through Ministry of
Law, Aayakar Bhavan Annexe
New Marine Lines, Bombay-20.

2. Customs, Excise and Gold Control
Appellate Tribunal, West Regional
Bench, PNB House, 3rd Floor,
Sir P.M.Road, Bombay 400 001.
through its Assistant Registrar.

3. The Gold Control Administrator
Ministry of Finance,
Department of Revenue, North
Block, New Delhi.

4. The Collector of Central Excise,
& Customs, Nagpur, Saraf
Chambers, 2nd Floor, Nagpur, M.S. Respondents

Mr.A.M.Sethna i/b.Mr.D.H.Shah for the petitioners.

Mr.H.V.Mehta with Ms.S.V.Bharucha i/b.Dr.T.C.Kaushik for the respondents.

CORAM : R. M. LODHA &
J. P. DEVADHAR,JJ.

DATED : 20th April, 2006

ORAL JUDGMENT (Per R.M.Lodha,J.).

The heirs of late Ramratan Shrivallabh Chandak, by means of this writ petition, seek to challenge the order dated 28th February, 1986 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (for short, "the Tribunal").

2. On the basis of the information received by the concerned authority under the Gold (Control) Act, 1968, the search was conducted in the residential premises of Ramratan Srivallabh Chandak (since deceased) on 25th March, 1974. The search continued for three days. During the course of search, the primary gold was found in the wooden almirah kept in the room on the second floor. In the first compartment of the almirah 18 gold foils weighing 49.300 gms were found. At the base of this almirah, there was a drawer. That did not contain any incriminating material. The drawer was completely

pulled out and it was found that there was a cavity at the base in between the base of the drawer and the base of the almirah. In the cavity 'Kalyan magazines' were found lying and upon removal of these magazines, one dabba containing three cartons of cuticura shaving sticks was found. Each carton of cuticura shaving sticks contained four gold slabs i.e. 12 gold slabs weighing 3730.800 gms were found. In the cavity, a cotton cloth bundle containing 13 gold rods in the shape of 'kadas' weighing 1326.800 gms was also found. These articles were seized and panchanama was drawn.

3. On 28th March, 1974 Ramratan Srivallabh Chandak was asked to make a statement but he expressed his inability for not being well. Later on his statement was recorded on 3rd April, 1974 and 2nd May, 1974. On the basis of the seizure of the primary gold, allegedly in contravention of the Gold (Control) Act, the notice was issued to Ramratan Srivallabh Chandak to show cause as to why the seized primary gold be not confiscated under Section 71 of the Gold (Control) Act for contravention of Sections 8(i) and 16 of the said Act. Ramratan Srivllabh Chandak was also prosecuted under Sections 8(i) and Section 16 read with Section 85(ii) of the Gold (Control) Act, 1968.

4. In response to the show cause notice, Ramratan Srivallabh Chandak filed reply and set up the case that he had no knowledge that gold was kept in the almirah. He submitted that gold was presumably kept by his mother who had never informed him about the said gold. The plea was also raised that the seized gold articles were not primary gold.

5. By the order dated 16th July, 1974 the Central Excise Collector ordered absolute confiscation of 12 gold slabs, 13 gold rods and 18 gold foils aggregate weighing 5395.000 gms and one mohar weighing 11 gms. The penalty of Rs.5 lacs was also imposed upon him under Section 74 of the Act.

6. Aggrieved by the order dated 16th July, 1974 passed by the Collector, Central Excise, Ramratan Srivallabh Chandak preferred appeal. The appellate authority-Gold (Control) Administrator by the order dated 27th March, 1976 set aside the order dated 16th July, 1974 being in violation of principles of natural justice and remanded the matter back to the Collector for fresh consideration.

7. After remand, the Collector, Central Excise heard Ramratan Srivallabh Chandak and vide order in original dated on 15th May, 1976, ordered absolute confiscation

of 12 gold slabs weighing 3730.800 gms and 13 gold rods weighing 1614.900 gms. As regards 18 gold foils weighing 49.300 gms, the Collector ordered confiscation, but permitted the gold foils to be redeemed on payment of fine of Rs.500/-. The Collector imposed a penalty of Rs.2 lacs.

8. Ramratan Srivallabh Chandak dissatisfied with the order dated 15th May, 1976 preferred the appeal before the Gold (Control) Administrator. The appeal was dismissed vide order dated 21st December, 1976.

9. Aggrieved by the concurrent adverse orders passed by the Collector, Central Excise and the Gold (Control) Administrator, Ramratan Srivallabh Chandak made an application to the Central Government under the then existing Section 82(2) of the Gold Control Act. However, the said application came to be transferred to the Tribunal. During the pendency of appeal before the Tribunal, Ramratan Srivallabh Chandak died and his legal representatives (present petitioners) were brought on record.

10. By the time the appeal came up for hearing before the Tribunal, the Criminal case had been disposed of by the Chief Judicial Magistrate, Amravati. In its judgment dated 12th/17th October, 1979, the Chief

Judicial Magistrate, held that the gold slabs, gold rods and gold foils were primary gold. Gold foils were held to be in conscious possession of Ramratan Srivallabh Chandak ('the accused'). However, as regards 12 gold slabs and 13 gold rods, the Chief Judicial Magistrate held that the accused cannot be held to be in conscious possession thereof. The Chief Judicial Magistrate, thus, with regard to the possession of gold foils held that an offence under Section 85(ii) of the Gold Control Act has been established and sentenced him to pay a fine of Rs.1,000/- and in default to suffer R.I. for a period of one month.

11. Reverting back to the appeal before the Tribunal, inter-alia, in the backdrop of the judgment and the findings of the Criminal Court, it was contended before the Tribunal that 12 gold slabs and 13 gold rods could not be held to be in conscious possession of Ramratan Srivallabh Chandak.

12. As a matter of fact, in the cross-objections filed by the department before the Tribunal, though we are amazed by such course, the department also submitted before the Tribunal that in the light of the decision given by the Chief Judicial Magistrate on 12th/17th October, 1979 and that the department has not gone in appeal against that decision, the petitioner's case that

he was not in conscious possession of the 12 gold slabs and 13 gold rods merits consideration.

13. The Tribunal vide its judgment dated 28th February, 1986 confirmed the confiscation of 12 gold slabs and 13 gold rods without an option to redeem. However, the Tribunal reduced the penalty from Rs.2,00,000/- to Rs.30,000/-.

14. In our view, writ petition deserves to be allowed on the short ground of non-consideration of the findings of the Criminal Court by the Tribunal and the matter needs to be remanded back to the Tribunal for fresh consideration in accordance with law and in view thereof we do not deem it necessary to deal with diverse contentions raised by the Counsel for the petitioners.

15. In the case of Gopaldas Udhavdas Ahuja & anr. v. Union of India & ors., **(2004) 7 SCC 33**, the Supreme Court, interalia, considered the effect of order of acquittal in the prosecution under Section 85(1)(ii) read with Section 8(1) on the order of confiscation passed under Section 71(1) read with Section 8(1)by the Authorised Officer in respect of the primary gold.

16. The Supreme Court observed thus:

> "19. ..... In both the proceedings, the basic facts were common. The recovery of incriminating articles was the same in both the proceedings. The same witnesses were examined in both the proceedings. The same charge of possession was there in both the proceedings. The said charge was sought to be proved by the same set of officers in both the proceedings. The witnesses and the officers who saw the recovery were common in both the proceedings. However, the criminal court on consideration of the entire evidence came to the conclusion that both the accused had no knowledge of the gold concealed in the ornamental top of the cupboard in the eastern bedroom from where the entire gold was seized whereas the Authorised Officer in the proceedings under Section 71(1) of the Act ordered confiscation on the ground that recovery was made from the cupboards in the eastern and western bedrooms and from the telephone room; that Appellant 2 had produced the key with the help of which the secret vault in the cupboard in the western bedroom could be opened and, therefore, the appellants were in conscious possession of the said gold. It was further held by the Authorised Officer that when the gold in respect of which any provision of the 1968 Act had been contravened, such gold, ipso facto, attracted confiscation."

17. Then the Supreme Court noticed its earlier judgment in the case of M.Paul Anthony v. Bharat Gold Mines Ltd., **(1999) 3 SCC 679** and observed that it would be unjust, unfair and oppressive to allow the decision of the Authorised Officer in confiscation proceedings to stand against acquittal by the competent criminal court. Clarifying that the said observation should not be taken to mean that there is no difference between departmental proceedings under Section 71(1) and the prosecution for illegal possession under Section 85(1), in paragraph 21

of the report, the Supreme Court observed thus:

> "21. ..... A combined reading of Sections 8(1), 71(1) and 85 of the 1968 Act made it clear that the legislature intended to provide for two separate proceedings before two different forums and there is no conflict of jurisdictions between the Authorised Officer acting under Section 71(1) to direct confiscation on being satisfied that an offence has been committed and the Magistrate making an order on conviction of an accused under Section 85(1) and that mere acquittal in the trial before the Magistrate, in every case, cannot result in setting aside, ipso facto, of the orders of confiscation passed by the competent authority under the Act. That merely because there was acquittal in the trial before the Magistrate, due to paucity of evidence or otherwise, would not entail nullification of the order of confiscation of the seized articles in every case. (See Divisional Forest Officer v. G.V.Sudhakar Rao). In any event, on a plain reading of Sections 8(1) and 71(1) it is clear that the Authorised Officer was required to be satisfied that an offence under the Act had been committed. That the confiscation proceedings were separate and distinct from prosecution under the Act. However, that difference did not entitle the Authorised Officer to proceed arbitrarily in making an order for confiscation."

18. In the light of the aforesaid legal position, no doubt is left that the finding of the criminal court may have some effect on the order of confiscation though it is not always that acquittal in the criminal case ipso facto results in setting aside the order of confiscation passed by the competent authority under the Act. What is needed to be seen is: Are the basic facts common? Is the recovery of incriminating articles same? Have same witnesses been examined in both proceedings? Is

there same charge of possession in both proceedings? Is the evidence same? If the answer to all these questions is in affirmative and in the absence of any material distinguishing feature, it would be legally improper to allow the confiscation order to stand against the finding of the Criminal Court.

19. In so far as the present case is concerned, the judgment of the Criminal case, technically, is not that of acquittal since in respect of 18 gold foils, the Chief Judicial Magistrate held that the accused had conscious possession of the said gold articles. However, in respect of 12 gold slabs and 13 gold rods which is a subject matter of this writ petition, the criminal court held in unmistakable terms that the accused could not be held to have conscious possession of the said gold items. The criminal court held thus:

> "....I do not wish to enter into this controversy because, in my opinion, even otherwise, the accused has sufficiently shown that he had no knowledge of the gold being kept there. At any rate, the explanation furnished by the accused, does appear acceptable. An inference in his favour could be drawn. As held by the Supreme Court in A.I.R. 1971 S.C. page 66 in Khadu Morton vs State of Bihar, that if two reasonable conclusions can be reached on the basis of the evidence on record, then the view favouring the accused ought to be preferred, in this case, the conclusion which could be reasonably reached is favour of the accused has to be preferred. It must therefore be held that the accused had no knowledge that the primary gold was concealed in that cavity. Consequently

> therefore, it could not be said that the accused was in conscious possession of the same. To this extent, therefore, the prosecution has not succeeded in establishing that the accused was in conscious possession of Gold slabs and gold rods."

20. The legal position is no more res-integra that "possession of gold" in contravention of 1968 Act means ‘conscious possession’. The conscious possession of gold in contravention of 1968 Act is an offence for prosecuting under Section 85(1) and also for confiscation under Section 71(1).

21. Before the Tribunal, specific contention was raised on behalf of the petitioners that the finding recorded by the criminal court that the accused was not in conscious possession of 12 gold slabs and 13 gold rods needs to be taken into consideration. As a matter of fact, even on behalf of the Department, it was conceded by way of cross objections (leaving apart necessity of such cross objections) that the appellants plea that there was no conscious possession of the offending gold in so far as the 12 slabs and 13 rods were concerned, merited consideration. We find that the Tribunal did not advert to the finding of the criminal court at all in so far as the it related to conscious possession of the gold slabs and gold rods, though they accepted the finding of the criminal court that the said items were primary gold. For a proper decision in the matter, it

was necessary on the part of the Tribunal, to advert to the finding of the criminal court thoughtfully and if in their view, the order of confiscation could stand against the finding of the Criminal Court, give adequate and justifiable reasons therefor.

22. In paragraph 18 of the writ petition, the ground has been specifically set up in the following words:

> "18. On behalf of the petitioners diverse submissions were made before the Respondent No.2. The submissions, contentions and arguments canvassed before the Appellate Tribunal were not at all considered. The petitioners had challenged the order of confiscation of seized gold and imposition of penalty upon Ramratan Chandak. It was contended before the Appellate Tribunal that a favourable finding of the Chief Judicial Magistrate about the unconscious possession of gold by Ramratan Chandak ought to have been considered by the Tribunal. The learned Members of the Tribunal did not touch upon the submission in their order. The petitioners had invited the attention of the learned Members about the practice, precedent and policy of the Govt. of India in the matter of release of primary gold on certain conditions under Section 73 of the Act. The Appellate Tribunal, however, rejected the appeal confirming the order of absolute confiscation of gold, without assigning any reasons on the points raised by the petitioners."

23. No reply has been filed by the revenue and this aspect is not even denied.

24. In our considered view this aspect goes to the root of the matter and, therefore, the matter needs to be

remanded to the Tribunal for fresh consideration in accordance with law and the observations made hereinbefore.

25. Before we close, we may deal with the objection raised by the counsel for the revenue that alternative remedy of making a reference application under Section 82-B(3) of the Gold (Control) Act, 1968 was available to the petitioners but they did not avail of the statutory remedy. According to the counsel for the revenue, the writ petition has been filed by the petitioners to circumvent the limitation provided under sub-section (3) of Section 82-B.

26. It does appear that the petitioners availed of the remedy right upto making the reference application under sub-section (1) of Section 82-B. The said reference application came to be dismissed by the Tribunal on 24th June, 1987. However, instead of filing a reference application before this Court under Section 82-B (3), the petitioners filed writ petition setting up a ground that a similar writ petition No.2928/1987 has been admitted by the Court and the rule granted. This is what the petitioners have to say in paragraph 25 of the writ petition:

> "25. The petitioners have approached this Hon'ble Court somewhat late because they were

under the wrong and mistaken notion of law that the writ petition is not maintainable against the order of the Appellate Tribunal and that only reference lies. The petitioners were also under the wrong notion that only an appeal lies to the Supreme Court against the order of the Appellate Tribunal. The petitioners thereafter learnt that no appeal lies before the Hon'ble Supreme Court against the order of the Regional Bench of the Customs, Excise & Gold (Control) Appellate Tribunal. The Respondent No.2 herein is the West Regional Bench of the Customs, Excise & Gold (Control) Appellate Tribunal. The order of the said Appellate Tribunal is final. In the meantime the petitioners came to know that this Hon'ble Court has admitted a similar writ petition No.2928 of 1987 and the Rule granted. In the said petition, the last impugned order was passed by the Appellate Tribunal WRB Bombay. The seized gold of 24 carats purity was absolutely confiscated by the Gold Control Authorities. The Appellate Tribunal confirmed the order of the lower authority without granting an option to get the gold released on payment of fine. The principal facts and grounds of challenge to the impugned orders in the said writ petition are similar to the present petition. The petitioners, therefore, pray for the condonation of delay in approaching this Hon'ble Court. The petitioners have lost their ancestral property worth of Rs. 16 lakhs (market value of today) without any fault on their part. There is no other alternative remedy for the redress of their grievance is available. It would, therefore, just, proper and equitable to entertain this petition and grant appropriate relief by this Hon'ble Court."

27. In our view, the contention of the alternative remedy raised by the counsel for the revenue does not deserve to be allowed at this distance of time when the writ petition was admitted by this Court on 17th August, 1988 and the petition has remained pending for more than 17 years and 8 months.

28. In the result, we dispose of the rule by the following order:

(i) The order dated 28th February, 1986 passed by the Customs, Excise and Gold Control Appellate Tribunal, West Regional Bench, Bombay is set aside.

(ii) The matter GC (T) (Bom) 1 of 1977 - Ramratan Srivallabh Chandak(deceased), through his legal heirs v/s. Collector of Central Excise & Customs, Nagpur is restored to the file of Customs, Excise and Service Tax Appellate Tribunal, West Regional Bench, Mumbai.

(iii) All contentions of the parties are kept open to be agitated before the Tribunal. We clarify that the remand is not confined to the aspect that has been considered by us above.

(iv) The petitioners are directed to appear before the Tribunal on 22nd May, 2006. The Tribunal may hear the matter on that date or fix any other date, as may be

convenient to it for deciding the matter expeditiously.

. No costs.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)